

MINUTES

**MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON AGRICULTURE, LIVESTOCK AND IRRIGATION

Call to Order: By **CHAIRMAN KEITH BALES**, on February 12, 2003 at
3 P.M., in Room 422 Capitol.

ROLL CALL

Members Present:

Sen. Keith Bales, Chairman (R)
Sen. Dale Mahlum, Vice Chairman (R)
Sen. Ken (Kim) Hansen (D)
Sen. Sam Kitzenberg (R)
Sen. Walter McNutt (R)
Sen. Linda Nelson (D)
Sen. Gerald Pease (D)
Sen. Corey Stapleton (R)
Sen. Mike Taylor (R)
Sen. Joseph (Joe) Tropila (D)

Members Excused: None.

Members Absent: None.

Staff Present: Jennifer Stephens, Committee Secretary
Doug Sternberg, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion
are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 299, 2/5/2003
Executive Action:

HEARING ON HB 299

Sponsor: REP. JIM PETERSON, HD 94, BUFFALO

Proponents: John Bloomquist, MT Stock Growers Association
John Semple, MT Cattle Women Association
Chase Hubbard, Rancher, Helena

Opponents: Travis Ahner, MT Trial Lawyers Association

Opening Statement by Sponsor:

REP. JIM PETERSON, HD 94, BUFFALO, explained that HB 299 amends a very old statute that has been recently interpreted by the Montana Supreme Court. The statute places strict liability on livestock owners. He said the reason for HB 299 is because of a case between Madrid v. Zinchicoo Land and Livestock. In that particular case, a bull owned by Zinchicoo entered the property of his neighbor and in the process of retrieving the bull, an employee of Zinchicoo and an employee of the neighbor captured the bull and put him in a trailer. In the process, the bull escaped, knocked down the neighbor's employee resulting in injury. The neighbor's employee sued Zinchicoo for damages and injuries. The litigation resulted in a couple of district court rulings that basically said the old court rulings that had been on the books did not impose strict liability on the owner of the livestock. However, on an appeal, the court interpreted the statute to, in fact, impose strict liability on the owner of the livestock and reversed the previous court opinions. HB 299 addresses the Supreme Court opinion by placing the word "negligent" in the statute. REP. PETERSON said the opinion basically creates a standard of culpability on the livestock owner and assesses any claims for damages. Simply put, he said the Zinchicoo decision places livestock owners under an unreasonable standard of liability. Strict liability means there is no opportunity for a court to examine the issues of fault, breach of duty, assumption of risk, or comparative fault. The only issue is damages. That as such, the livestock owner is left with no defense. HB 299 provides that a livestock owner is liable if the owner of the livestock is negligent or engages in intentional misconduct which results in damages. The standard for HB 299 tries to get a statute somewhat similar to the duty and obligation of the livestock owner as do accidents involving vehicles and livestock. In 2001, the legislature changed the statute to include the words "gross negligence". HB 299 removes the word "gross". HB 299 modifies section 81-4-215 in a manner that would place liability to the livestock owner in those instances where he or she is clearly at fault, or intentionally causes harm but provides defense to the livestock owner in other

circumstances. He also explained the amendments on the bill, **EXHIBIT**(ags31a01).

Proponents' Testimony:

John Bloomquist, MT Stock Growers Association, said **REP. PETERSON** gave an excellent background as to why HB 299 is so important. He further explained the statute that is being amended was on the books for 115 years and was never interpreted by the courts. The court read it literally in the Supreme Court decision and in establishing strict liability. He said if the bill is not passed, not only are livestock owners subjected to strict liability any time their livestock would happen to get out, the insurance companies might change their policies on liability insurance. He ended by asserting HB 299 would make the statute more reasonable.

John Semple, MT Cattle Women Association, said he concurred with previous testimony.

Chase Hubbard, Rancher, Helena, said his understanding of HB 299 is that if livestock break through a legal fence, the change of nature of that stock owners liability from strict to a more ordinary standard. Strict liability, he said, would mean there is no wiggle room. The livestock owner would be liable and not be given the opportunity to raise a defense. The law change would not serve to deny that liability exists, it would allow an examination of the facts in order to determine if it exists or to what degree it exists. **Mr. Hubbard** explained that he has never been in a livestock situation where he has been held liable, but he can think of many examples where it could happen and lead to an unfortunate consequence. Livestock just have a way of getting out, despite the best laid plans and state of the art facilities. He gave the example of elk damage, snow drifting over fences, gates left open, vehicle damage, trees falling on fences, and sometimes the fenced animals are able to jump over the fence. He ended by saying that there may be liability if the landowner knows there is a problem and he fails to correct it. HB 299 does not change that. It does, however, apply a reasonable standard and allows an examination of the facts surrounding an animal breaking through or going over a fence and creating a problem.

Opponents' Testimony:

Travis Ahner, MT Trial Lawyers Association, submitted written testimony, **EXHIBIT**(ags31a02).

Questions from Committee Members and Responses:

SEN. KEN HANSEN asked **Mr. Ahner** what a legal fence is. **Mr. Ahner** defined a legal fence as any one of the following, "if not less than 44 inches or more than 48 inches in height shall be a legal fence in the state of Montana. The fence has to be three barbed horizontal well-stretched wires, the lowest of which must not be less than 15 inches or more than 18 inches from the ground, securely fastened, equi-distant as possible, substantial posts set into the ground or well-supported leaning posts not exceeding 20 feet apart or 33 feet apart where two or more stays of pickets are used equi-distant between posts. All corral fences which are used excessively shall not be less than 16 feet from such stack substantially built with posts not more than 8 feet distance from each other, not less than 5 strands of well stretched barbed wire, shall not be less than 5 or more than 6 feet high. All fences constructed of any standard woven wire not less than 28 inches in height securely fastened to substantial posts not more than 30 feet apart, provided that 2 equi-distant barbed wires will be placed above the same with the height." **Mr. Ahner** described this type of fence as being a sheep fence where small animals cannot crawl under. All other fences of barbed wire which should be as strong and well calculated to protect enclosures, all fences consisting of four boards, rails, or poles with standing or leaning posts not under 17 feet, 6 inches apart. All rivers, hedges, mountain ridges, and bluffs or other barriers over or through which it is impossible to stop the calves. **Mr. Ahner** stopped to explain that when it says you've got to put up and maintain a legal fence, there are some pretty strict requirements, so if the fence does not fall under the requirements for a legal fence, then cattle crossing over would not make the livestock owner liable. He also wanted to point out that at the very beginning of the definition for a legal fence, it says "anyone of the following, if not less than 44 inches or more than 48 inches high shall be a legal fence", so if HB 299 passes and someone has a fence that is 48 inches high and cattle cross over it, the livestock owner is not going to be responsible because he wasn't negligent, his cows just got over. Even if the fence is built 6 feet high and cows still get over, there still is a problem because the fence is no longer legal.

SEN. KEN HANSEN wanted to know if a rancher is responsible for fencing ground if he is near a farmer. **Mr. Ahner** said it is not the responsibility of the livestock owner to fence his livestock in.

{Tape: 1; Side: B}

He said this is because the law is based on the open range policy. **SEN. HANSEN** said that in Blaine county, if farmers and ranchers are located adjacent to one another, each one chooses a

side. **Mr. Ahner** again asserted that farmers have the responsibility of fencing animals out.

SEN. MIKE TAYLOR asked what would happen if a person kept his side of the fence legal but his neighbor, a farmer, who is sharing the fence does not make the effort to keep it legal. He wanted to know who would be responsible. **Mr. Ahner** said the person who kept the fence legal would not be held responsible for his neighbor not keeping his side legal. He said that it is solely the responsibility of the farmer to keep animals out. He acknowledged that there are cases where people share the duties of keeping up a fence because that is part of being a good neighbor and it's how the system works, especially with miles and miles of fence, but when it becomes a legal question, the rancher can still make the argument that it is up to the farmer to fence animals out.

SEN. LINDA NELSON asked if the rules would be the same if a person were in a herd district. **Mr. Ahner** under current law, it is completely a "fence out" standard. The committee disagreed. The question was deferred to **John Bloomquist**. **Mr. Bloomquist** said than in an open range, a land owner fences livestock out. In a herd district, the livestock owner is responsible for fencing livestock in. He also said that if a legal fence is not maintained, a person is still strictly liable. He said that is what would change with the adoption of HB 299.

SEN. NELSON asked how negligence would be defined. **Mr. Bloomquist** said that negligence is a lack of ordinary care. **SEN. NELSON** then asked if a person would have to go to court to prove negligence. **Mr. Bloomquist** said a person would have to go to court. If it is intentional misconduct, he said it is fairly easy to show the rationale, but to prove negligence, certain factors have to be taken into consideration.

SEN. DALE MAHLUM asked what would happen if a fence looked legal, but in fact was internally weak due to dry rot in the posts. He wanted to know if a bull gets across and does damage, would it be the fault of the fence owner. **Mr. Bloomquist** said no. The fence owner would not be negligent because the fence, while it was standing, was legal. The question of negligence would have to be proven.

SEN. COREY STAPLETON asked what percentage of Montana is open range. **Mr. Bloomquist** said most of the state is open range. **SEN. STAPLETON** further asked if ordinary care in open range means that owners don't need to keep up their fences. **Mr. Bloomquist** said that if there is a fence that is erected, there is an obligation on maintaining the fence to the right. Even in open

range, when there is a fence, there is an obligation for both adjacent property owners to maintain it. **SEN. STAPLETON** explained an instance where he was driving and almost hit a cow in the middle of the road. After swerving to avoid the cow, he went to a nearby town in order to report to the police that a cow was in the road. His intention was so no rancher would be held liable for damages due to his cow being on the loose. The officer explained to him that the rancher who owned the cow would not be held liable for any damages. This led **SEN. STAPLETON** to think that there is no mechanism to require fence owner to keep their fences maintained, especially because they are not held liable. **Mr. Bloomquist** said that there are a lot more fences than there used to be so they are hard to maintain. He also suggested that HB 299 might help this problem. **SEN. STAPLETON** asked if the law is changed, how it would affect other laws. Specifically, he wanted to know if the change in the law would alleviate responsibility from something more serious, such as loss of life. **Mr. Bloomquist** said that the bill does not run into other areas of the law, it just addresses the relationship between land owners and ranchers and changes the strictness of liability. **SEN. STAPLETON** then asked what a person would do if they ran into a cow on the road. **Mr. Bloomquist** said that HB 299 does not cover such instances.

SEN. STAPLETON asked what the definition of gross negligence is. **Mr. Bloomquist** said it's up to the courts to decide, but generally it is defined as the lack of exercising even slight care. It is an elevated level of negligence. He described it as having a situation where someone repeatedly had trouble with livestock getting out and is very aware of the problem.

SEN. KEITH BALES asked what the implications are in terms of animals running at large. **Mr. Bloomquist** said that part of the bill has to do with a section that tries to cover many things, one of which is animals unlawfully running at large.

{Tape: 2; Side: A}

SEN. BALES asked what the course of action would be if the law is not changed as suggested in HB 299. **Mr. Bloomquist** said that if the bill does not pass, it would be easy for a trial lawyer to win a case because of how hard it is to prove gross negligence. He said that strict liability cases are the easiest cases in the world to prosecute or sue somebody on.

SEN. NELSON asked why there have not been more cases concerning strict liability if it is so easy for trial lawyers to win the cases. **Mr. Bloomquist** said that the old law is an issue now

because it has been interpreted and now strict liability is defined. He added when decisions are laid down by the courts, they become very known to practicing lawyers. The law is very well known now and that is why he thinks there will be problems in the future.

SEN. STAPLETON said he had a problem with line 15 of the bill. He wanted further clarification as to whom "owner" was referring to. He also said he wanted to add the sentence, "occupant of the enclosure if the owner of the animals", or, "person in control of the animals". He thinks the bill needs this clarification because the word "owner" is used to describe both the animal owner and the fence owner. He also thinks that the sentence runs on too much. **REP. JIM PETERSON** responded by saying that the bill only deals with the owners of livestock in the whole section, therefore, owner does not have to be specific. He does not think that adding words would make it any clearer.

Doug Sternberg, Legislative Branch, said that some clarification could be added into the new language to distinguish between owners. He said these changes could be made at the same time amendments were being made.

Closing by Sponsor:

REP. JIM PETERSON, reemphasized the importance of the change from "grossly negligent" to "negligent". He also reminded the committee that in the case of a herd district, the cattle need to be fenced in whereas in an open range, cattle must be fenced out. He closed on HB 299.

ADJOURNMENT

Adjournment: 4:30 P.M.

SEN. KEITH BALES, Chairman

JENNIFER STEPHENS, Secretary

KB/JS

EXHIBIT (ags31aad)